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Kajang Heights Sdn Bhd v Ng Yuet Fang & Ors and another suit

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HIGH COURT (KUALA LUMPUR) — SUITS NO S2(S5)–22–572 OF 1996 & NO S2(S5)-22–172 OF 1996
AZMEL J
21 JUNE 2007

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Contract — Breach — Performance of contract — JVA between registered owners of land and housing developer — Mandatory for plaintiff to obtain planning and conversion approvals within 18 months — Application for conversion was obtained — Whether conversion approval included planning approval

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Contract — Breach — Performance of contract — JVA between registered owners of land and housing developer — Whether plaintiff breached JVA by failing to obtain approvals from relevant authority within 18 months — Whether defendants estopped from termianting the JVA as they continued to conduct themselves as if the JVA was still subsisting

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A joint venture agreement ('JVA') was executed dated 19 October 1992 between the defendants being the registered owners of the land and the plaintiff a housing developer who would develop the JV land. Clause 6.1 of the JVA made it mandatory for the plaintiff to obtain planning and conversion approvals from the relevant authorities within 18 months of the date of the JVA. The period of 18 months expired on 18 April 1994. The land office by a letter dated 10 March 1994 informed the plaintiff that its application for conversion, land use and sub division of the land to 'Building' had been approved subject to conditions imposed by the land office. The plaintiff had written to the defendants on 21 March 1994 informing them that the necessary approvals were obtained and requested that all documents were to be in the safe custody of the defendants' solicitors to be exchanged with the bank guarantee. On 7 March 1995 the defendants' solicitors wrote to the plaintiff's solicitors stating that the plaintiff had only furnished evidence that the conversion approval was obtained but no evidence that planning approval had been duly approved. On 13 March 1996, the defendants terminated the JVA. There were two main issues from the dispute between the plaintiff and the defendants: (i) Whether the conditions in cl 6.1 of the JVA had been complied with; and (ii) Whether the acts of the defendants after 18 April 1994 and prior to 13 March 1996 estopped the defendants from denying the validity of the JVA.

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Held, allowing plaintiff's claims with costs:

(1) There were two types of approvals that had to be obtained under cl 6.1, namely, planning and conversion approvals. The approval for conversion of land was granted on 19 January 1994. PW2 a town planner, gave evidence that whenever conversion approvals had been granted it could be assumed that the planning approvals had also been granted because before conversion approvals was obtained the town planning department must have given their recommendation in respect of all the planning related to the development. And in the letter by the land office dated 16 June 1995, it was very clear that conversion approval included planning approval (see para 12).

(2) As regard the second issue, the court found that the defendants did not, prior to the letter dated 13 March 1996 took the position that the JVA had been terminated. On the evidence adduced the defendants continued to conduct themselves as if the JVA was still subsisting. If the principle of effluxion of time, was relied upon by the defendants to reflect termination of the JVA, then the agreement would have been terminated on 18 April 1994 being the final day of the 18 month period. However, the defendants continued to seek clarification and enquired with the land office as to the meaning of planning approval. Thus it could be safely concluded that the defendant was still treating the JVA as subsisting (see paras 21–22).

[Bahasa Malaysia summary

Satu perjanjian usahasama ('PUS') bertarikh 19 Oktober 1992 dimasuki di antara defendan-defendan yang merupakan pemilik-pemilik berdaftar tanah dan plaintif, sebuah pemaju perumahan yang akan membangunkan tanah usaha sama tersebut. Klausa 6.1 PUS menjadikan ia mandatori untuk plaintif memperolehi kelulusan perancangan dan tukar syarat tanah daripada badan berkuasa dalam masa 18 bulan daripada tarikh PUS. Jangkamasa 18 bulan tamat pada 18 April 1994. Pejabat tanah melalui surat bertarikh 10 Mac 1994 memaklumkan plaintif bahawa permohonannya untuk tukar syarat, kegunaan tanah dan perpecahan tanah tersebut kepada 'Bangunan' telah diluluskan tertakluk kepada syarat-syarat yang dikenakan oleh pejabat tanah. Plaintif telah menulis kepada defendan-defendan pada 21 Mac 1994 memaklumkan kepada mereka bahawa kelulusan-kelulusan yang perlu telah diperolehi dan meminta kesemua dokumen-dokumen di bawah penjagaan peguamcara defendan-defendan ditukar dengan jaminan bank. Pada 7 Mac 1995 peguamcara defendan-defendan menulis kepada peguamcara plaintif menyatakan bahawa plaintif hanya membekalkan bukti kelulusan tukar syarat yang telah diperolehi tetapi tiada bukti perancangan telah diluluskan. Pada 13 Mac 1996, defendan-defendan menamatkan PUS tersebut. Terdapat

A dua isu-isu pertama daripada pertikaian di antara plaintif dan defendan-defendan: (i) sama ada syarat-syarat di kl 6.1 PUS tersebut telah dipatuhi; dan (ii) sama ada tindakan-tindakan defendan-defendan selepas 18 April 1994 dan sebelum 13 Mac 1996 mengestopkan defendan-defendan daripada menafikan keesahan PUS tersebut.

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Diputuskan, membenarkan permohonan plaintif dengan kos:

C (1) Terdapat dua jenis kebenaran yang harus diperolehi di bawah kl 6.1, iaitu, kelulusan perancangan dan tukar syarat tanah. Kelulusan tukar syarat tanah telah diberikan pada 19 Januari 1994. PW2, seorang perancang bandar, telah memberi keterangan bahawa apabila kelulusan tukar syarat diberikan ia boleh dianggap bahawa kelulusan perancangan juga telah diberikan oleh kerana sebelum kelulusan tukar syarat D diberikan jabatan perancangan bandar semestinya akan memberikan pendapat mereka berhubung dengan segala perancangan berhubungan dengan pembangunan tersebut. Dan surat daripada pejabat tanah bertarikh 16 Jun 1995, dengan jelas menyatakan bahawa kelulusan tukar syarat termasuk kelulusan perancangan (lihat perenggan 12).

E (2) Berhubungan dengan isu kedua, mahkamah mendapati bahawa defendan-defendan tidak, sebelum surat bertarikh 13 Mac 1996 mengambil kedudukan bahawa PUS tersebut telah ditamatkan. Berdasarkan keterangan yang ada kelakuan defendan-defendan adalah F seperti PUS tersebut masih berkuatkuasa. Sekiranya prinsip aliran masa digantung oleh defendan-defendan untuk mencerminkan penamatan PUS tersebut, maka perjanjian tersebut sepatutnya ditamatkan pada 18 April 1994 iaitu hari terakhir jangkamasa 18 bulan tersebut. Akan tetapi, defendan-defendan terus mendapatkan penjelasan dan membuat G pertanyaan dengan pejabat tanah akan maksud kelulusan perancangan. Dengan itu ia dapat diputuskan bahawa defendan masih menganggap PUS tersebut berkuatkuasa (lihat perenggan 21–22).]

Notes

H For cases on performance of contract, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2674–2680.

Cases referred to

Webb v Hughes [1870] LR 10 Eq 281 (refd)

I *Wong Kup Sing v Jeram Estate Ltd* [1969] 1 MLJ 245 (refd)

Brendan Siva (Kadir Andri & Partners) for the plaintiff.

K Ramesh (CW Loh and SY Lim with him) (CW Loh & Associates) for the defendants.

Azmel J (now FCJ):

[1] At the outset it must be pointed that, by consent of all parties suit no S2(S5)–572 of 1996 and suit no S2(S5)–22–172 of 1996 were heard together before me. Both suits involved the same plaintiff. The issue that need to be determined in both cases were the same. For purpose of this judgment I only refer to the facts of case in suit no S2(S3)–22–572 of 1996 which facts were similar to the other suit.

[2] In this case, the plaintiff claimed against the defendants as follows:

(i) a declaration that the Joint Venture Agreement ('JVA') is still valid and subsisting;

(ii) specific performance of the terms of the JVA;

(iii) an order that the defendants do deliver up possession of the JV land to the plaintiff;

(iv) all necessary and consequential accounts and inquiries;

(v) further and/or alternatively, damages for breach of contract;

(vi) costs;

(vii) interest on such sums as are found to be due to the plaintiff at the rate of 4% per annum from the date of filing of the writ; and

(viiii) interest on such sums as are found to be due to the plaintiff at the rate of 8% per annum from the date of judgment until final settlement.

[3] The brief facts are as follows. There was a joint venture Agreement (JVA) executed dated on 19 October 1992 between the defendants being the registered owners of the land and the plaintiff as a housing developer who would develop the JV land. The clauses in the JVA that give rise to the dispute are:

(i) Clause 2.3 (Article II)

It is mutually agreed that it is a condition precedent to this agreement that all necessary planning approvals be obtained.

(ii) Clause 5.1 (Article V)

The owners shall upon the execution of this Agreement deposit the title deed relating to the said land free from all encumbrances together with the Memorandum of Transfer executed in escrow with the owner's

A solicitor, Messrs Chye, Chow, Chung & Co of 4th Floor, Bangunan Lim Tan, Jalan Pudu, 55100 Kuala Lumpur ('the owner's solicitors') as stakeholders'.

(iii) Clause 5.2

B Upon approval of the application of conversion and subdivision of the property by the appropriate authorities the developer's solicitors, Messrs Tan Eng Choong & Co, 4th Floor, Bangunan Chiew See Fan, No. 5 Jalan Yap Ah Loy, 50050 Kuala Lumpur shall inform the owner's solicitors who upon such receipt of such notice shall release the title C deeds and the memorandum of transfer to the developer's solicitors for transfer in favour of the developer and therefore surrender the same to the appropriate authorities for amalgamation, conversion and issuance of individual subdivided qualified titles subject to the following conditions precedent:

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5.2.1 The developer obtaining a bank guarantee or performance bond from a licensed commercial bank or other financial institution duly licensed and authorized to provide such guarantee under the Banking and Financial Institution Act 1990 in favour of the owners of an E amount equivalent to Ringgit Seventy-eight ($78,000) per acre of the said land.

5.2.2 The developer shall endeavour to obtain a letter of guarantee in the form and manner as set in the draft letter of guarantee (performance bond) annexed hereto and to include all reasonable additions, F amendments or alterations as may be required by the commercial bank or financial institution as aforesaid giving the said Bank Guarantee (performance bond) which additional amendments or alterations shall be acceptable to the owner's solicitors.

G (iv) Clause 6.1 (Article IV)

It shall be a condition precedent to this Agreement that the Developer together with the assistance of the owner as set out above shall apply for and within eighteen (18) months of the date hereof obtain the planning and conversion approvals from the relevant authorities. In the event of H termination, Article IX and X shall apply'.

(v) Clause 9.1 (Article IX)

The events deemed to lead to termination of this agreement shall include the following:

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(a) Any one or more of the approvals or consents as stated in Article VI above are not obtained within the time or period stated therein subject to any extension of time that may be mutually agreed upon by both parties.

[4] The period of 18 months (cl 6.1) within which the plaintiff was to have obtained the approvals, expired on 18 April 1994. The land office by a letter dated 10 March 1994 informed the plaintiff that its application for conversion, land use and sub division of the land to 'Building' had been approved subject to conditions imposed by the land office. The plaintiff had written to the defendants on 21 Mac 1994 informing them that the necessary approvals were obtained and requested that all documents were to be in the safe custody of the defendants' solicitors to be exchanged with the bank guarantee.

[5] On 8 November 1994 the plaintiff's solicitors forwarded the proposed/draft bank guarantee to the defendants' solicitors for perusal and approval.

[6] On 7 March 1995 the defendants' solicitors wrote to the plaintiff's solicitors stating that the plaintiff had only furnished evidence that the conversion approval was obtained but no evidence that planning approval had been duly approved.

[7] After having written to the land office for confirmation, the defendants' solicitors on 13 May 1995 received a reply from the land office notifying them that 'pelan pertakapan' (lay-out) was approved and registered by Pengarah Jabatan Perancangan Bandar dan Desa Negeri Selangor on 9 May 1995.

[8] Following another letter to the land office for further clarification, the plaintiff's solicitors on 16 June 1995 received a reply from the land office informing them that the conversion approval given by the land office on 10 March 1994 was inclusive of 'dasar perancangan' (basic plan). The land also stated that the 'pelan pertakapan' which was approved by the Pengarah Jabatan Perancang Bandar dan Desa Negeri Selangor on 9 May 1995 was the actual development plan for the said lands.

[9] The plaintiff claims that they have obtained the necessary approvals within the time stipulated and that the JVA is still valid and subsisting whereas the defendants claim that the plaintiff had not obtained the approvals within the time stipulated.

[10] In my view, the dispute between the plaintiff and the defendants could be adequately determined by addressing two main issues:

(a) whether the conditions in cl 6.1 of the JVA had been complied with;

A (b) whether the acts of the defendants after 18 April 1994 and prior to 13 March 1996 estopped the defendants from denying the validity of the JVA.

[11] At the hearing the plaintiff called three witnesses including the B plaintiff's director ('PW1'), a registered town planner ('PW2') and an Assistant Land Officer ('PW3'), while the defendant called two witnesses who are among the land owners of the JVA land.

[12] In dealing with the first issue, it is very essential to give a proper C interpretation of cl 6.1 of the JVA. Clause 6.1 as stated above makes it mandatory for the plaintiff to obtain planning and conversion approvals from the relevant authorities within 18 months of the date of the JVA. The period of the 18 months expired on 18 April 1994. There are two types of approvals that had to be obtained under cl 6.1, namely, planning and conversion D approvals. The approval for conversion of land was granted on 19 January 1994. The only question that needs to be determined was whether planning approval had been obtained and if so when was it obtained and whether it was granted together with the conversion approval on 19 January 1994 or on 9 May 1995.

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[13] PW2 a town planner, gave evidence that in 1993-1994, for anybody to apply for a change of category of land use, a topography plan and a basic concept plan must first be submitted. The Land Administrator will then forward the application for conversion to the relevant bodies for their F consideration and comment. The feedback and comment will be reverted to the Land Administrator as to whether they approve the application. This will be forwarded to the Pejabat Tanah dan Galian where the Standing Committee will decide whether to grant approval or not. If granted, the Pejabat Tanah dan Galian will prepare a summary to the State Executive's Committee for endorsement. At this time, the Pejabat Tanah dan Galian will G have informed the developer of the decision.

[14] After that a layout plan has to be prepared by the consultant town planner for approval when the approval for conversion is granted. The lay-out H plan would have to be submitted to the Pentadbir Tanah Daerah for layout approval. Once the government departments have reverted their comments, it will be forwarded to the Jabatan Perancang Bandar & Desa for endorsement and approval. The Pentadbir Tanah Daerah will then inform the applicant of the decision.

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[15] In his evidence, PW2 went on to say that:

> In the State of Selangor at that time in 1993 and 1994, planning approval was done at the same time as the process of obtaining approvals for conversion'. 'During the process of obtaining the approvals for conversion, Town & Country

> Planning Department of the State Government would have given their input and comments. If they have no objection to the plans submitted together with the Application for Conversion, this would mean that proposed development conforms with their overall planning of the area where the land is situated.

During cross examination, PW2 also said:

> Whenever conversion approvals had been granted it can be assumed that the planning approvals had also been granted because before conversion approvals is obtained the town planning department must have given their recommendation in respect of all the planning related to the development.

[16] Based on PW2's evidence as stated above, it can be seen that when conversion approval was granted, the planning approval was also granted.

[17] In the letter by the Land Office dated 16 June 1995, it is very clear that conversion approval includes planning approval. The second para of the letter states:

> Sukacita dimaklumkan kelulusan tukar syarat tanah keatas hakmilik-hakmilik tersebut sepertimana surat pejabat ini bil (24) di dalam siri yang sama bertarikh 10 March 1994 adalah merangkumi kelulusan dasar perancangan yang dibenarkan berdasarkan ulasan dan pandangan Jabatan Perancang Bandar dan Desa Negeri Selangor yang menyatakan tiada apa-apa halangan di atas pembangunan tanah ini.

[18] It is very clear from the above letter that the conversion approval dated 19 January 1994 also includes planning approval.

[19] In Lewinson K, *The Interpretation of Contracts*, Sweet & Maxwell, 1989, it is stated:

> Parties do not make a contract in vacuum. They always negotiate against the background of the law. It is therefore reasonable to suppose that they take into account the general law in reaching their ultimate consensus. And accordingly the proper construction of their agreement is properly influenced by the legal background against which it is made.

[20] For the reasons as stated above it is my finding that the plaintiff had obtained the planning and conversion approvals from the relevant authorities. I therefore arrived at the conclusion that cl 6.1 of the JVA had been complied with by the plaintiff.

[21] As regard the second and final issue, I find that the defendants did not, prior to the letter dated 13 March 1996 (defendants' letter of termination of

A the JVA), take the position that the JVA had been terminated. On the evidence adduced before me the defendants continued to conduct themselves as if the JVA was still subsisting.

B **[22]** If the principle of effluence of time was relied upon by the defendants to reflect termination of the JVA, then the agreement would have been terminated on 18 April 1994 being the final day of the 18 month period. However, the defendants continued to seek clarification and enquired with the Land Office as to the meaning of planning approval. Thus it can be safely C concluded that the defendant was still treating the JVA as subsisting.

[23] On the question time being made of the essence of the contract I need to refer to the case of *Webb v Hughes* [1870] LR 10 Eq 281. The dictum of Sir R Malins VC stated:

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> But if time be made of the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract...'

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[24] This dictum was approved Raja Azian Shah J (as he then was) in *Wong Kup Sing v Jeram Estate Ltd* [1969] 1 ML J 245 where His Lordship stated:

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> Once time for completion was allowed to pass and the parties went on negotiating, time was no longer of the essence of the contract and the defendants must give a reasonable notice of their intention to abandon the contract if the balance of the purchase money was not paid: (Webb v Hughes; Stickley v Keeble). If the defendants had on the very day of 30 November 1966 ie, the original date of G completion, made their stand, their decision would have been that time was of essence and it would have been proper for them to give notice on the next day fixed for completion that they would abandon the contract; but after going on negotiating they should have given a reasonable notice (Tilley v Thomas).

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[25] The same situation happened in the instant case. After 18 April 1994, being the final date of completion for obtaining the approvals, the defendants continued to act as if the JVA was still subsisting thereby giving the impression that the date of completion had been abandoned. It is also settled I law that after the completion date of 18 April 1994, in order for the defendants to terminate the JVA on the ground non-performance the defendants must give notice to the plaintiff of such intention. No such notice of a new date of completion had been issued by them. In such a situation the JVA would be deemed to have continued to subsist.

[26] In the light of the reasons as stated above I allow the plaintiff's claim as prayed with costs.

Plaintiff's claims allowed with costs.

Reported by Sally Kee